LEE PIN SENG v. PUBLIC PROSECUTOR

[F.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah F.JJ.) February 7, 1984]

[Kuala Lumpur – Federal Court Criminal Application No. 17 of 1983]

Criminal Law and Procedure – Application to refer question of law to Federal Court – Acquittal in Sessions Court at end of prosecution case – Appeal allowed and defence called – Duty of court at end of prosecution case – Criminal Procedure Code (F.M.S. Cap. 6) s. 173(f) – Courts of Judicature Act, 1964, s. 66(1).

In this case the applicant and four others were charged in the Sessions Court at Kuala Lumpur with an offence under section 420 of the Penal Code. At the close of the prosecution case the applicant and two others were acquitted on the said charge. The Public Prosecutor appealed and the High Court ordered the applicant and two others to make their defence on the said charge. The applicant thereupon applied to the Federal Court for an order regarding the provision of section 173(f) of the Criminal Procedure Code.

Held: (1) the application was premature. There was nothing to prevent the applicant from taking up the matter at a later stage. There was no necessity to make a ruling at this stage. The trial should therefore continue before the learned President of the Sessions Court;

(2) although section 173(f) of the Malaysian Criminal Procedure may not be word for word the same as the Singapore section 188, nevertheless the effect is the same.

Cases referred to:–

(1) *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49; [1981] 3 W.L.R. 395.
(2) *A. Ragunathan* v. *Pendakwa Raya* [1982] 1 M.L.J. 139.
(3) *Cecil Rajah* v. *Public Prosecutor* [1981] 1 M.L.J. 147.

FEDERAL COURT.

G. Sri Ram for the applicant.
Fong Seng Yee (Senior Federal Counsel) for the respondent.

Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court): The applicant and four others were charged in the Kuala Lumpur Sessions Court with an offence under section 420 of the Penal Code. At the close of the prosecution case on March 30, 1983 the applicant and two others were acquitted on the said charge. Being dissatisfied with the acquittal the respondent appealed to the High Court. On November 23, 1983, after hearing arguments, the High Court ordered the applicant and two others to make their defence on the said charge. The learned Judge took the view that the learned President was wrong to acquit the applicant and two others while calling on two other accused to make their defence on substantially the same evidence. Instead of appealing against the decision of the learned Judge, the applicant applied to this Court for an order pursuant to section 66 of the Courts of Judicature Act regarding the provisions of section 173(f) of the Criminal Procedure Code which reads:

"If, upon taking all the evidence hereinbefore referred to, the Court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the Court shall record an order of acquittal."

The learned Judge applied the principle in *Haw Tua Tau* v. *Public Prosecutor*(1), a decision of the Privy Council which was followed by this Court in *A. Ragunathan* v. *Pendakwa Raya*(2), *Haw Tua Tau's case* makes clear that at the close of the prosecution case the learned President of the Sessions Court had to determine as a question of law whether on the evidence as adduced, and unrebutted, the accused would lawfully be convicted, that is to say, whether there was with respect to every element in the charge some evidence which, if accepted, would either prove the element directly or enable its existence to be reasonably inferred. In *Haw Tua Tau's case* the Privy Council was commenting on section 188 of the Singapore Criminal Procedure Code (Amendment) Act 1976 which is similar to our section 173(f).

The applicant submitted that our section 173(f) is actually not similar to the Singapore section 188 and that it is not applicable to summary trial in our Subordinate Courts. He cited a few local authorities to show conflict. It is his submission that one should not follow *Haw Tua Tau's case.*

We agree with the respondent that although our section 173(f) may not be word for word the same as the Singapore section 188 nevertheless the effect is the same. The application is premature. There is nothing to prevent the applicant from taking up the matter at a later stage. There is no necessity for us to make a ruling now. Section 66(1) of the Courts of Judicature Act provides:

"When an appeal from a decision of a subordinate court in a criminal matter has been determined by the High Court, the Federal Court may on the application of any party and shall on the application of the Public Prosecutor grant leave for the determination by itself of any question of law of public interest which has arisen in the course of the appeal and the determination of which by the High Court has affected the event of the appeal."

In *Cecil Rajah* v. *Public Prosecutor*[3] where the facts are quite similar in that the applicant was acquitted by the Sessions Court at the end of the prosecution case and on appeal by the respondent the High Court allowed the appeal and ordered the defence to be called. Thereupon, the applicant applied for certain questions of law of public interest to be reserved for the determination of this Court. Concluding the judgment of the Court, Suffian L.P. observed:

"We are of the opinion that in the circumstances of this case the most convenient procedure should be followed, namely that we should uphold the learned judge's order dismissing the application, so that the case should continue before the President of the Sessions Court. Only after he has determined the case, after fully considering counsel's submission on the evidence and the law, and, if there is an appeal, after the learned High Court judge has given us the benefit of his views on all the points raised, will it be convenient for us to consider such points of law of public importance that may be referred to us by him under section 66(1)."

We did not think we should interfere with the decision of the learned Judge. The trial should continue before the learned President. We would dismiss the application.

Application dismissed.

Solicitors: *Sri Ram, Zulkifly & Kumar.*

LEE WAI KIN v. YULEK SDN. BHD.

[O.C.J. (Siti Norma Yaakob J.) February 12, 1986]

[Kuala Lumpur – Originating Summons No. F. 1013 of 1985]

Strata Title – Sale and purchase of flat – Purchase price paid by purchaser – Strata title not issued – Charges and expenses to be paid by whom – Strata Titles Act, 1985, ss. 8(1) & 10.

Conveyancing – Sale and purchase of flat – Strata title not issued – Charges and expenses to be paid by whom – Strata Titles Act, 1985, ss. 8(1) & 10.

The plaintiff, by agreement of sale and purchase dated October 4, 1973, purchased a flat in a block of buildings developed by the defendant. He had paid the purchase price of $13,000 and is in occupation of the flat. Strata title to the flat has not been issued to the plaintiff, and the defendant had been demanding various sums of money from the plaintiff for expenses to be incurred for applying for such a title. The plaintiff referred several questions to the Court for determination.

Held: (1) it was incumbent upon the defendant to apply for the strata title on behalf of the plaintiff;

(2) the defendant was entitled to collect payment from the plaintiff for the expenses to be incurred in the application for the strata title;

(3) the amount to be collected from the plaintiff must be the prescribed fee that was to be paid under section 10 of the Strata Titles Act 1985. As the defendant had been guilty of the delay it was only right and proper that it should be prepared to advance its own funds for the costs of the application and then seek a reimbursement from the plaintiff of such costs which amount must be the prescribed fee under section 10 of the Strata Titles Act 1985;

(4) the defendant was not entitled to collect payment of the prescribed fee from the plaintiff in advance;

(5) as the parties had agreed that $50 shall be charged for each assignment, the defendant could not, by reason of inflation, raise the consent fee to $500;

(6) the defendant is not entitled to increase the maintenance fee generally from $2.50 to $15 per month, to collect a sum equivalent to 3 months maintenance fee in advance and to charge interest on overdue payment.

ORIGINATING SUMMONS.

By this summons the plaintiff sought the following relief, *viz.*, the determination of the court on the following questions and issues:

(a) whether the agreement dated October 4, 1973, in particular, clauses 20 and 24 imposed a contractual obligation on the defendant to apply for strata title;

(b) if the answer to paragraph (a) is negative; whether Part Nine Chapter 4 of the National Land Code, 1965 imposes a statutory duty on the defendant to apply for strata title;

(c) if the answer to either paragraph (a) or paragraph (b) or both of them are in the positive; whether the defendant is entitled to collect payment from the plaintiff for the expenses which may be incurred in the application for strata title;

(d) if the answer to paragraph (c) is in the positive; what is the basis or criteria to be used for assessing the amount of payment to be collected from the plaintiff, and in particular, whether the defendant is entitled to make profit out of the application for strata title;

(e) if the answer to paragraph (c) is in the positive; whether the defendant is entitled to collect payment from the plaintiff in advance;

(f) pending application and issuance of the strata title; whether the defendant is entitled to charge the plaintiff a "consent fee" of $500.00 for consenting to any intended assignment;

(g) pending application for strata title and incor-